UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Ranger American Armored Services, Inc.,
Employer,

and Case No. 12-RD-269202

Edwin Roman
Petitioner,

and

Union de Profesionales de la Seguridad Privada
y Transporte de Valores,
Union.

PETITIONER'S REQUEST FOR REVIEW

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INTRODUCTION

On November 18, 2020, Edwin Roman ("Petitioner" or "Mr. Roman") filed a petition to decertify his exclusive bargaining representative, Union de Profesionales de la Seguridad Privada y Transporte de Valores ("the Union"), with the requisite showing of interest. Unless overruled or an exception is found, the National Labor Relations Board's ("NLRB" or "Board") "contract bar" doctrine requires dismissal of the petition, thereby prohibiting Petitioner and his co-workers from exercising their fundamental right to choose their representative until 2022. The contract bar is a Board-created limitation on employees' statutory rights not found in the text of the National Labor Relations Act ("NLRA" or "Act"), *see NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994), which conflicts with its core purpose. As in *Mountaire Farms*, Case No. 05-RD-256888, the Board should use this opportunity to reevaluate and eliminate the contract bar. "If the rights of employees are being disregarded," it is incumbent upon the Board "to take affirmative action to effectuate the policies of the Act" and ensure that "those rights be restored." *McCormick Constr. Co. (Local 542, Operating Eng'rs)*, 126 NLRB 1246, 1259 (1960).

This case is only the latest example of an employee's election petition being threatened with dismissal because of the contract bar's unwarranted restrictions. Mr. Roman filed his decertification petition because he was dissatisfied with the Union's representation, its contract, and its requirement that he pay compulsory dues or be terminated. At the time Mr. Roman filed this decertification petition—and due to a fortuity out of his control—his employer, Ranger American Armored Services, Inc.

("Ranger American") and the Union had agreed to a three-year collective bargaining agreement ("CBA") with effective dates of December 16, 2019 to December 16, 2022. Unless a narrow exception applies under cases like *Paragon Products Corp*., 134 NLRB 662 (1961), the contract bar mandates dismissal of this and all similar petitions to oust the Union or switch representatives for the first three years of the CBA—even in the face of objective evidence proving the Union has lost majority support. *Gen. Cable Corp.*, 139 NLRB 1123 (1962).

Over many decades the contract bar has trapped countless employees in an unwanted exclusive bargaining relationship and made the union the employees' master and the employees "prisoners of the Union." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 73 (1975) (Douglas, J., dissenting). Moreover, the contract bar as currently established is not simply a three-year limitation on the filing of an election petition: even if employees wait the requisite three years, they must then contend with byzantine rules, unforgiving time-periods, and complicated contract language over which they have no control, any one of which could lead the Board to dismiss the petition. These impediments have real-world consequences, and have contributed to the fact that the vast majority of union-represented employees in the United States—an astonishing 94%—have never voted for the union that exclusively represents them.[1]

[1] James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Found., *Backgrounder* No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union.

The Board should reconsider and reject the contract bar in its entirety. That bar is not found in the Act and was rejected by the very first Board in 1936. Its current form stems from decades of incremental increases in union power and administrative overreach at the expense of employee free choice. Given the nationwide importance of this issue, the Board should take this opportunity to grant review and eliminate the contract bar.

As noted, the Board is currently revisiting the contract bar doctrine in *Mountaire Farms, Inc.* Case No. 05-RD-256888. Although the Board should grant review here, at the very least it should stay consideration of the instant matter pending its decision on the contract bar doctrine in *Mountaire Farms, Inc.*

FACTS AND PROCEDURAL HISTORY

Petitioner is an employee of Ranger American in San Juan, Puerto Rico. The Union is the exclusive bargaining representative for a unit of private security guards and other workers at Ranger American, including Petitioner. Ranger American and the Union are parties to a CBA that was executed on December 16, 2019. The CBA expires on December 16, 2022. Its "union security clause" in Article II states, in pertinent part:

> Section 1: Each employee who is a bona fide member of the Union as of the date of the signing of this collective bargaining agreement will, as a condition of employment, remain as a bona fide member of the Union and/or will pay the dues and charges that the Union establishes during the contract term.
>
> Section 2: As a condition of employment, any employee that as of the date of the signing of this collective bargaining agreement is not a bona fide member of the Union, shall form part of the Union and/or pay the dues and charges that the Union establishes on the thirty-first day following the signing of this contract and continue being a union member and/or pay the dues and charges established by the Union.

> Section 3: Each person hired after the signing of this contract, as a condition of employment, shall enroll and remain as a bona fide member of the Union and/or pay dues and charges established by the Union, no later than the thirty-first day after being hired.
>
> Section 4: By written request of the union to the company, the company agrees to separate from employment any employee that refuses or fails to enroll as a bona fide union member and/or refuses to or stops paying dues and charges established by the Union pursuant to this article and the applicable law.

CBA Art. II (See Appendix A)[2]

On November 18, 2020, Petitioner filed his decertification petition supported by the requisite number of signatures for a showing of interest. On December 21, 2020, the Director of NLRB Region 12 found that the "contract bar" prohibited Petitioner's election and issued a letter dismissing the case. Petitioner now respectfully requests review of the Region's decision to bar an election due to the existence of a collective bargaining agreement between the Union and Ranger American, to which he had no input and over which he had no control.

ARGUMENT

I. The Contract Bar Should Be Eliminated.

The "contract bar" is a Board invention with no basis in the text of NLRA Section 9 or in the Act's legislative history. The bar should be dispensed with on this ground alone, as the first Board correctly held in *New England Transportation Co.*, 1 NLRB 130, 136–39 (1936). The contract bar also should be dispensed with because it entrenches unions

[2] The quoted section of the CBA is in the Spanish language and has been translated into English by the undersigned counsel. Petitioner can file a certified English translation of the quoted passage, should the Board deem it necessary.

that lack majority employee support, thereby undermining the cornerstone of the Act—employees' Sections 7 and 9 right to choose or reject union representation. 29 U.S.C. §§ 157 & 159. The Board should eliminate the contract bar and grant the instant Request for Review on that ground.

A. The Contract Bar Contradicts the Act and Fundamental Legal Principles.

1. The contract bar is not found in the Act.

The contract bar has no basis in the text of the Act. It is a purely Board-created device, *Dominick's Finer Foods*, 28 F.3d at 683, and goes well beyond any limits on elections Congress contemplated. When Congress enacted the NLRA, it created only one bar to elections—the "election bar," which prohibits elections for one year after a valid election has been conducted. *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2). These were the sole limits Congress placed on employees' right to petition for elections and "bargain collectively through representatives of their own choosing," or to refrain from doing so. 29 U.S.C § 157. That Congress did not provide bars on employee free choice beyond the one-year "election bar" suggests the contract bar deviates from the statute Congress enacted. The fact that the contract bar is now three times *longer* than Congress' one-year election bar further indicates that the contract bar contradicts congressional intent.

Consistent with this understanding, the first Board rejected altogether a contract bar in its earliest interpretation of the Act. "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change

their representatives . . . ." *New England Transp. Co.*, 1 NLRB at 138.[3] Not until decades later, in *General Cable Corp.* 139 NLRB 1123 (1962), did the Board concoct the current three-year bar. The Board should return to its initial, correct assessment that the Act favors full freedom of association and forecloses any contract bar.

2. The contract bar contradicts the Act's guiding principle: employee free choice.

Employee self-representation and free choice are the Act's paramount objectives. Section 7 of the Act could not be clearer: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . *and shall also have the right to refrain from any or all such activities* . . . ." 29 U.S.C. § 157 (emphasis added).[4] As the D.C. Circuit recently stated: "The *raison d'être* of the National Labor Relations Act's protections for union representation is to vindicate the *employees'* right to engage in collective activity and to empower *employees* to freely choose their own labor representatives." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

NLRA Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate

[3] *New England Transportation* cited favorably to the National Mediation Board's election procedures, which recognize employees' full freedom of association and lack any contract bar. *Id.* at 139.

[4] Similarly, Section 8(a)(3) precludes "discrimination in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization*." 29 U.S.C. § 158(a)(3) (emphasis added). Further, Section 9 grants employees the right to file an election petition "alleging that a substantial number of employees (i) wish to be represented for collective bargaining . . . or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, *is no longer a representative* as defined in [section 9(a)]." 29 U.S.C. § 159(c)(1)(A) (emphasis added).

for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (emphasis added). Thus, the Act permits exclusive representation only if a majority of employees support that union's representation. *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring). "The Act's twin pillars are freedom of choice and majority rule in employee selection of representatives." *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1151 (D.C. Cir. 2017) (internal quotations & citations omitted). Without the actual support of a majority of employees, exclusive representation violates the Act. *Garment Workers'*, 366 U.S. at 737-39.

The contract bar, which has the effect of forcing unwanted representation on employees for a lengthy time, is inimical to the purpose and policies of the NLRA. The contract bar contradicts the Act's well-established "bedrock principles of employee free choice and majority rule," *Gourmet Foods, Inc.*, 270 NLRB 578, 588 (1984) (Member Dennis, concurring), because it allows a union to continue to exclusively represent employees even in the face of objective evidence proving the union has lost majority support.

Many Board members have recognized that election bars frustrate employee free choice. *See, e.g.*, *UGL-UNICCO Serv. Co.*, 357 NLRB 801, 810 (2011) (Member Hayes, dissenting) (an election bar does not aid employee free choice, but serves only "the ideological goal of insulating union representation from challenge whenever possible.") *Americold Logistics LLC*, 362 NLRB 493, 503 (2015) (Member Miscimarra, dissenting)

(the various bars' main purpose is to "protect [incumbent] unions from decertification or displacement by a rival union."). Other Board members, however, have asserted that so-called "industrial stability" or "labor peace" justifies sundry non-statutory restrictions on employee free choice. *See, e.g.*, *Lamons Gasket Co.*, 357 NLRB 739 (2011). They are mistaken for many reasons.

First, as discussed above, the Act's policy of "encouraging the practice and procedure of collective bargaining," 29 U.S.C. § 151, depends on a majority of employees *wanting* to engage in collective bargaining through an exclusive representative. *See Levitz Furniture Co.*, 333 NLRB 717, 731 (2001) (Member Hurtgen, concurring) (recognizing that the NLRA "pronounce[s] a policy under which our nation protects and encourages the practice and procedure of collective bargaining for those employees *who have freely chosen to engage in it.*"). If a majority of employees do not want to engage in collective bargaining, the Act does not favor exclusive representation. "There could be no clearer abridgment of Section 7 of the Act" than to "grant[ ] exclusive bargaining status to an agency selected by a minority of its employees." *Garment Workers'*, 366 U.S. at 737. In short, "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting).

Thus, the Act's policy interest in "encourage[ing] the practice and procedure of collective bargaining" favors elections and employee free choice whenever a question concerning representation exists, and not barring such elections for arbitrary time periods. Only with an election can the Board determine whether employees subject to a union's

exclusive representation support or oppose continuing to engage in "the practice and procedure of collective bargaining."

Second, the continued imposition of a minority union on unwilling employees weakens industrial stability because it leads to employee frustration and even outrage at the injustice of unwanted representation. If "industrial stability" is supposed to produce contented workers and no strikes, walkouts, or workplace dissension that slows production, how is that achieved when a minority union and an unpopular CBA are foisted on employees? Indeed, industrial stability is diminished when employees are barred from voting on their incumbent union and, even worse, are simultaneously barred from voting on whether to ratify or reject the union's proffered CBA. *See, e.g.*, *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967) ("It is within [the unions'] province to determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification."); accord *Movers & Warehousemen's Assn v. NLRB*, 550 F.2d 962, 965 (4th Cir. 1977); *N. Country Motors Ltd.*, 146 NLRB 671, 674 (1964) ("The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf.").

Third, barring employees from voting on union representation once a contract is in place does not aid industrial stability because employees usually cannot judge a union's effectiveness until *after* it agrees to a contract. Employees presented with a new CBA should be able to vote promptly on whether they wish to work under that union's representation and that particular CBA. This is especially true since, as pointed out above, the employees have no statutory right to ratify or disapprove the union's proffered

contract. *Houchens Market*, 375 F.2d at 212. Current law provides employees dissatisfied with a newly negotiated CBA little or no recourse, because the contract bar locks them in and prevents them from voting on workplace representation for up to three years.

Fourth, the contract bar thwarts industrial stability by allowing unions and employers effectively to collude at employee expense. With the contract bar, both unions and employers have the incentive to enter into sweetheart contracts because employees cannot throw off a contract's yoke for at least three years, no matter how unfavorable it is to employees' rights and interests. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 537 (D.C. Cir. 2003) (recognizing that "colluding" employers and unions can misuse the contract bar "at the expense of employees and rival unions"); *YWCA of W. Mass.*, 349 NLRB 762, 764 (2007) (recognizing the "danger that unions and employers may collude to defeat employees' representational wishes on the basis of illusory or fabricated agreements.").

Fifth, experience shows the contract bar is unnecessary for industrial stability. For nearly sixty years, employers and unions have entered into long-term CBAs such as five-year agreements, which do not provide contract bar protection for the final two years of the agreement. *See, e.g., Coca-Cola Enters., Inc.*, 352 NLRB 1044 (2008) (describing long-term agreements). Although five-year agreements provide two fully "open" years at the agreements' end, there has not been a rash of decertification elections that follow the first three years *just because* a bar does not happen to exist for those years. It follows that eliminating the contract bar in its entirety will not precipitate a rush of decertification petitions during the first three years of a contract. Rather, it will merely allow those

employees who *are* dissatisfied with their union to exercise their statutory rights under NLRA Sections 7 and 9 to be free from representation, the same as those employees who file petitions after three years of their long-term contract. *Shaws Supermarkets, Inc.*, 350 NLRB 585 (2007) (employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration).

Finally, the contract bar contradicts one of the most enduring and cherished principles of common law—that an agent serves at the pleasure of the principal and can be removed by the principal at any time. See generally *Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005) (discussing the principal-agent relationship). Under the modern labor law paradigm, unions are the employees' fiduciary agent and the employees are the principal, presumably clothed with the power to discharge that agent if they so choose. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) (analogizing the union-employee relationship to a trustee-beneficiary relationship, where the "trustee must act in the best interests of the beneficiaries."). The contract bar undermines this principle and holds employees hostage to an agent they may no longer want. *Emporium Capwell Co.*, 420 U.S. at 73 (Douglas, J., dissenting) (employees should not be "prisoners of the Union."). A union cannot properly act as the employees' fiduciary agent when there is a question of whether it remains their majority representative, or worse, if is known to be a *minority* representative. Yet the contract bar allows unions to regularly engage in such questionable representation because employees are forbidden from ousting them. Eliminating the contract bar will align Board law with established legal doctrines that

allow principals to choose when and how agents speak for them and bind them to contracts.

In short, the contract bar conflicts with the purpose and stated policy of the Act, and does nothing to enhance industrial stability. The bar should be eliminated.

B. The Contract Bar Has for Many Decades Hindered or Destroyed Employees' Rights Under NLRA Sections 7 and 9.

In practice, the contract bar has led to decades of litigation and a morass of rules and restrictions that grossly infringe on employees' Sections 7 and 9 rights. Far from ensuring the NLRA's neutrality concerning employees' decision to select a union or be unrepresented, *Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001), the contract bar entrenches incumbent unions by keeping them in power almost indefinitely. Employees are stuck with unwanted unions unless they collect signatures and file a petition during a short 30-day "open period" that falls 60–90 days (or 90–120 days in the health care industry) before the end of a three-year contract, or during a hiatus with an unknown end date. This confusing process leads to virtually permanent unionization through inertia, frustration, or legal machinations, not willful free choice. It is no wonder 94% of employees have never voted for the union that purports to represent them. See n.1, supra. Consumer advocates would rightly condemn a health club that created byzantine rules to make it virtually impossible for customers to end their memberships. The same should be condemned and changed here regarding the NLRB's complex contract bar rules.

Petitioner will now discuss each of the major hurdles employees face under the

contract bar regime.

1. The three-year term of a contract bar harms employees.

The current contract bar prohibits employees from filing a decertification petition for the term of a CBA or for three years, whichever is shorter. *See Gen. Cable Corp.*, 139 NLRB 1123. This three-year bar stems from years of incremental increase in infringements of employee rights. As noted above, the first Board correctly rejected a contract bar. *New Eng. Transp. Co.*, 1 NLRB 130. Later, the Board abandoned that interpretation and adopted a one-year contract bar. *Nat'l Sugar Refin. Co.*, 10 NLRB 1410, 1415 (1939) (creating a contract bar on the extremely thin rationale that it was not "contrary to the purposes and policies of the Act"). The bar was later extended to agreements lasting at least two years, *Reed Roller Bit Co.*, 72 NLRB 927 (1947); *Pacific Coast Ass'n of Pulp & Paper Manufacturers*, 121 NLRB 990 (1958), and finally to agreements lasting three years, *General Cable Corp.*, 139 NLRB 1123 (1962).

The Board's discussion in *General Cable Corp.*, 139 NLRB at 1124-29, shows the three-year contract bar impermissibly relegates employee rights to an afterthought, subordinated entirely to unions' and employers' administrative convenience:

> In adopting a 3-year rule we have heeded the appeals for a more extended contract-bar period presented in oral arguments, letters, telegrams, memorandums, and briefs by the overwhelming majority of labor and management representatives. Indeed, this substantially unified stand of both labor and management has been a most important consideration in arriving at our decision.

Id. at 1125. The Board in *General Cable Corp.* failed to pay more than lip service to employees' paramount interests in free choice, baldly stating as an *ipse dixit*: "such

[three-year bar] rule on balance will not seriously impair employee freedom of choice." *Id*. at 1128. But Mr. Roman, stuck in a union he vehemently opposes, with a substandard contract that requires him to pay compulsory dues for three long years or be fired, disagrees.

Mr. Roman filed his petition on November 18, 2020, less than a year after the Union and Ranger American executed their CBA. He and his fellow employees were unhappy with that contract and their union representative, and made a conscious choice to exercise their right to vote out the Union. If the Union succeeds in its argument that his petition is barred, Mr. Roman and his fellow employees will be subject to its representation for several additional years and be forced to pay dues to a union they would otherwise oust, all because of an arbitrary and non-statutory three-year prohibition on decertification elections. Moreover, this three-year bar self-perpetuates for contracts like the Ranger American CBA that contain automatic extension provisions:

> Section 1: This collective bargaining agreement shall be effective prospectively from 16 December 2019 and shall remain in place until midnight of 16 December 2022.
>
> The same shall be extended automatically for one (1) year unless any of the parties notifies the other in writing of its wish to change, alter, amend, or terminate this Agreement, with no less than sixty (60) and no more than ninety (90) days before the termination of this agreement. In case that the written notice is sent by one of the parties, they shall meet and try to negotiate a new collective bargaining agreement.

CBA Section XXXI (Appendix B)[5]

[5] The quoted section of the CBA is in the Spanish language and has been translated into English by the undersigned counsel. Petitioner can file a certified English translation of the quoted passage, should the Board deem it necessary.

The Board allows each automatic renewal to constitute a new contract bar. *See* CBA Art. XXXI (Appendix B); *Koenig Bros., Inc.*, 108 NLRB 304 (1954).

Even if an employee waits until his three-year bar period ends, it can be extremely difficult to calculate dates and comply with the contract bar's byzantine rules and time windows. For example, if Mr. Roman wanted to wait until the three-year contract bar expires at Ranger American, he would have difficulty calculating the proper date to file a petition. As seen, the Union and Ranger American signed their CBA on December 16, 2019, but the CBA states that it can be automatically renewed for one year upon expiration. If Mr. Roman used the text of the contract to determine when he should file his petition, he likely would have trouble determining the correct time to file. *See also Quality King Distribs., Inc.*, No. 29-RD-071777 (Feb. 15, 2012) (dismissing petition based on preamble date, despite no specific evidence of when the contract was executed). And such situations are not exceptional, as there are a myriad of cases in which convoluted contractual provisions significantly prejudiced employees wishing to exercise their statutory right to choose or dismiss their representative.

For example, in *Smith's Food & Drug Centers, Inc.*, No 27-RD-141924 (Order dated Feb. 13, 2015), a regional director dismissed a petition as untimely because, although the applicable memorandum of agreement did not have an automatic renewal provision, it incorporated by reference a contract that incorporated by reference a second contract containing such a provision. The regional director held this third-order automatic renewal provision created a new contract upon expiration of the CBA, and barred an election. With no apparent sense of irony, the regional director held that the CBA "clearly and

unambiguously" incorporated an automatic renewal provision in a 1996 contract, despite recognizing the automatic renewal provision:

> requires reference to the 1996 Utah Foodhandlers' Agreement (possibly as modified by the 2001 Salt Lake County Settlement), as modified by the 2001 Cedar City Settlement, and finally as modified by the 2006 Cedar City Settlement. Review of the 2001 Salt Lake County Settlement, the 2001 Cedar City Settlement, the 2006 Cedar City Settlement, and the 2009 MOA reveals that the expiration dates listed in those agreements only changed the start and end dates of the various agreements (the term of the agreement). None of the agreements explicitly eliminated the automatic renewal language contained in the 1996 Foodhandlers' Agreement.

RD Order at 20. Thus, the employees were prevented from exercising the Section 9 rights Congress gave them because of a decades-old automatic renewal provision they would have had no reasonable way to know existed. *See also Compass Grp. USA, Inc.*, No. 30-RD-068358 (Order dated Dec. 2, 2011) (holding a successor's adopting a CBA—which at the time of adoption did not operate as a bar to an election—constituted a new contract and operated as a bar until the expiration of the CBA).

Similarly, in *Forsythe Transportation, Inc.*, No. 05-RD-068230 (Order dated Dec. 1, 2011), the regional director dismissed a petition as untimely even though employees were kept in the dark about when they could timely file a petition. In that case, the CBA contained an automatic renewal provision and an expiration date of October 31, 2011. During the term of the contract, the parties changed the expiration date three times: to June 30, 2010, then to July 2011, and then again to October 2011. These changes were not communicated to employees. On September 22, 2011, the employee brought the contract (with the October 31, 2011 expiration date) to the Board's Washington Resident Office to ask about filing a timely petition. The information officer misinformed the

petitioner that he had missed his window period, but could file after the contract expired on October 31, 2011 and before a new agreement was signed. The petitioner filed his petition on November 4, which was dismissed as untimely because of the automatic renewal provision. *See also Suffolk Banana Co.*, 328 NLRB 1086 (1999) (contract does not forfeit "bar quality" even with an uncertain expiration date); *Watkins Sec. Agency of DC, Inc.*, No. 05-RD-201720 (Order dated Aug. 16, 2017) (contract barred an election despite containing three sets of potential operative dates for decertification). All of these situations make a reasonable person wonder if the NLRB election process was purposefully designed to be a cruel pitfall for the unwary—the victims of which are most often unrepresented employees.

2. The insulated period and window periods harm employees.

As currently constituted, the contract bar allows employees to decertify a union during a short, 30-day window period, generally 60–90 days before contract expiration, or 90–120 days in the health care industry. The time between the end of the window period and contract expiration is the Board's "insulated" period, during which decertification is prohibited.

The insulated period and window periods developed much as the contract bar itself—incrementally, arbitrarily and heavily favoring incumbent unions. In *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), the Board first adopted the "insulated period" sixty days from the expiration of the applicable CBA and specified a window period for petitions to be filed 150–60 days prior to contract expiration. *Id.* at 1000. In *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962), the Board reassessed this open

period as much too long, and reduced it to a mere 30 days, 60–90 days before contract expiration. Further complicating matters, in *Trinity Lutheran Hospital*, 218 NLRB 199 (1975), the Board created a separate 30-day window period 90–120 days before contract expiration for contracts involving health care institutions, discarding employee concerns and finding "no reason to provide more than a 30-day open period." *Id.* at 199.

The thirty-day window period, stuck arbitrarily near the end of a contract lasting for up to three years, reveals precisely how the Board's rules tilt the scales to favor incumbent unions and their experienced labor lawyers at the expense of unschooled employees: the "insulated period" during which the union is safe from all decertification petitions is twice as long as the period during which an employee (who has no specialized knowledge of labor law) can file for decertification.

Indeed, this complex regime requires employees who wish to challenge the incumbent union to have sophisticated legal knowledge of these fleeting window periods, as well as the foresight to plan their decertification efforts (*e.g.*, collecting a valid showing of interest with proper language on an authorization card or petition, *see Wyman Gordon Pennsylvania, LLC*, 368 NLRB No. 150 (Dec. 16, 2019) at 8-9) far in advance of the contract's expiration. By the time employees learn of their right to decertify the union, the thirty-day window period may have already passed. And, if the window period is missed, employees may have no opportunity to file for an election for another three years if their employer and union fortuitously agree to a successor contract during the insulated period.

These inflexible open and insulated periods have real consequences for employees simply seeking to exercise the rights Congress gave to them. For example, in *Community Support Services, Inc.*, No. 08-RD-218872 (Order dated June 25, 2018), an employee filed a petition during the open period 60–90 days prior to contract expiration. However, the regional director found that the 90–120 day health care window period applied to the unit and dismissed the petition as untimely, despite the employer's argument it was not a health care institution because it did not directly supply health care but instead operated as a "connector" for care. Thus, employees were prevented from exercising their Section 9 rights because of an arguable, ambiguous, and unforgiving legal technicality—whether they were "healthcare employees."

Finally, in *La Jicarita Rural Telephone Cooperative*, No. 28-RD-001008 (Order dated Jan. 24, 2011), an employee filed a petition one day before the contract (and therefore the insulated period) expired. The regional director not only dismissed the petition as untimely, but also granted the union *another sixty-day insulated period*, despite the alleged encroachment of a single day. Thus, an understandable mistake of filing one day early not only prevented employees from re-filing their petition for a sixty-day period, but could have prevented them from filing another petition for up to three years if a new contract was reached. *See generally Appalachian Shale Prods. Co.*, 121 NLRB 1160, 1164 (1958) (dismissing a petition filed within the insulated period). Again, the contract bar system seems purposefully designed to be a gigantic pitfall for unwary employees, and the Board should overrule it.

3. Contract hiatus rules are confusing for employees.

If an employee waits for the contract bar to end and a contract hiatus to occur before filing for decertification, he is subject to yet another set of arbitrary Board-created rules and limitations on his ability to file, to wit: Board precedent recognizes contract formation as a key contract bar date, even before an actual contract is formed or executed, based on informal and pre-contractual documents to which an employee is rarely privy. These often unpublicized documents can and do surprise employees, who mistakenly believe their petition is timely because the parties have not yet publicly executed a contract.[6]

For employees seeking to decertify during a hiatus period of uncertain length, the operative question for timely filing is: what constitutes a valid contract for purposes of ending the contract hiatus? The Board outlined its policy for determining this question in *Appalachian Shale*. There, the Board held that for a contract to constitute a bar, it must: (1) contain "substantial terms and conditions of employment" and (2) be signed by all parties before the filing of a petition. *Id.* 121 NLRB at 1162. Despite these seemingly clear rules, the Board has also recognized that a "contract" can bar an election even when

[6] It is not uncommon for employees seeking to decertify to learn that secret agreements or understandings, to which they were not privy, had a determinative effect on their Sections 7 and 9 rights. See, e.g., *USF Holland LLC*, No. 18-RD-239688 (Regional dismissal Order dated May 7, 2019 and Board Order denying review dated Nov. 7, 2019), where a decertification petition was dismissed because the original bargaining unit of about 12 employees was merged into a nationwide unit of 20,000 without the original employees' knowledge and assent). Moreover, it is not uncommon for unions to enter into secret agreements with employers that compromise employee interests, despite the fiduciary duties owed to those employees. See, e.g., *Merk v. Jewel Food Stores Div. of Jewel Cos., Inc.*, 945 F.2d 889 (7th Cir. 1991) (secret agreement violates federal labor policy); *Aguinaga v. United Food & Com. Workers*, 993 F.2d 1463 (10th Cir. 1993) (condemning a secret agreement between a union and employer); *Lewis v. Tuscan Dairy Farms, Inc*., 25 F.3d 1138 (2d Cir. 1984) (union's secret agreement with employer not to enforce employees' seniority rights breached the duty of fair representation).

it consists only of informal documents or an "exchange of a written proposal and a written acceptance, both signed." *Id.*

While these rules might seem like a logical application of basic contract formation principles, in practice they punish employees for missing deadlines over which they have no control and are likely unaware, and are ripe for abuse by unions and colluding employers. Individual employees are often kept in the dark about bargaining progress and do not know exactly when a contract was or will be executed, or what constitutes enough of a contract to meet the *Appalachian Shale* tests. Union officials can sign and enter into contracts without ratification votes or notice to the unit employees, *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 224 & n.2 (1991) (Member Stephens, concurring), and often rush through substandard contracts that harm employee interests solely to avoid a contract hiatus or a new "open period."[7]

In the wake of *Appalachian Shale*, the Board expanded its understanding of what constitutes a contract to include a wide range of pre-formation contract materials. For example, in *Georgia Purchasing, Inc.*, 230 NLRB 1174 (1977), the Board held an exchange of telegrams two days before a petition was filed was sufficient to bar an election, despite differences between what was referenced in the telegrams and what was actually signed. Further, a "contract" under current Board law can be shown through: telegrams, *id.*; tentative agreements, *Seton Medical Center*, 317 NLRB 87, 87–88 (1995

[7] Do these pre-formation contract materials serve as the beginning of the contract bar for purposes of calculating when an employee can decertify? The answer is surely no, otherwise most three-year contracts would have a duration of longer than three years and therefore have an open period for decertification at the end of the contract. This is a one-way street designed to frustrate employee free choice, which should not be allowed to continue.

(citing *St. Mary's Hospital*, 317 NLRB 89, 90 (1995)); e-mail exchanges, *Inwood Material Terminal, LLC*, No. 29-RD-206581, 2019 WL 656289, at n.1 (Jan. 30, 2019); informal offer letters incorporating certain terms by reference, *Liberty House*, 225 NLRB 869 (1976); and undated contracts, *Cooper Tank & Welding Corp.*, 328 NLRB 759 (1999) and *Western Roto Engravers, Inc.*, 168 NLRB 986 (1967).[8] In fact, the "Board does not require that an agreement delineate completely every single one of its provisions to qualify as a bar," as it only requires an agreement on "substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship." *St. Mary's Hosp.*, 317 NLRB at 90 (citing *Stur-Dee Health Prods., Inc.*, 248 NLRB 1100 (1980); *Levi Strauss & Co.*, 218 NLRB 625 (1975); *Spartan Aircraft Co.*, 98 NLRB 73 (1952)). In other words, the Board does not require an actual CBA to bar an election. See generally *Sarauer v. IAM Dist. No. 10*, 966 F.3d 661, 675-76 (7th Cir. 2020) (dispute over when a contract was formed for purposes of the Wisconsin Right to Work law raises a federal question).

The Board also does not require a *signed* contract to constitute a bar. In *Television Station WVTV*, 250 NLRB 198 (1980), the Board found that initials next to tentative agreement provisions sufficed as a signature, despite the parties having set a later date for the actual *signing* of the contract. *See id.* at 200–01 (Member Penello, dissenting) (discussing the legal problems with the Board's conclusion). In *Holiday Inn of Ft. Pierce*,

[8] The execution date of a contract can be crucial for purposes of timely decertification in contracts with a duration of greater than three years. Allowing a union's contract to bar an election with no specific date of execution, while requiring employees to adhere to severe time restrictions based on specific dates, is yet another example of the Board impermissibly putting its thumb on the scale in favor of unions and against employee rights.

225 NLRB 1092 (1976), the Board found a cover letter, signed by the employer's attorney with copies of the contract attached, constituted a sufficient signing of a contract for purposes of the contract bar.

Based on these principles, a decertification petition that was "late" by a single day was dismissed in *Riverside Hospital*, 222 NLRB 907 (1976). There, the employer on May 1 sent the union copies of a contract proposal it requested, along with a signed cover letter that contemplated counter-proposals and asked the union to notify the employer if it intended to ratify the contract proposal as sent. *Id.* This letter explicitly contemplated that the transmitted proposal was not necessarily the final contract and, as such, it was not executed by the employer. On May 7, the union ratified the agreement. On May 8, a decertification petition was filed. The union did not mail its executed version of the contract until May 14, even though its execution of the contract was dated May 7. The Board held the employer's signature on the May 1 cover letter constituted a signature on the contract and therefore the May 7 date of the union's execution was deemed the date of the contract's completion. Despite these union and employer machinations, the employee's petition was considered untimely by a single day and was dismissed. Again, a cruel joke was perpetrated on the employee and perhaps a majority of his co-workers.

To make matters worse if that were possible, NLRB regional directors have taken these principles and expanded them well outside the bounds of what is reasonable. For example:

- In *Centers for New Horizons, Inc.* No. 13-RD-143907 (Order dated Jan. 30, 2015 and RFR denied 2015 WL 1254861 (Mar. 19, 2015)), the regional

director found an e-mail containing an attorney's *signature block*—in many cases an automatic function of an e-mail program—with a contract proposal attached, to constitute a valid signature for purposes of the contract bar.

- In *Coast Auto Supply Co.*, No. 19-RD-064436 (Order dated Sept. 30, 2011), the regional director found an August 1 faxed contract with notations on it, combined with the employer's president's name written—not signed—on the fax cover sheet, to constitute a sufficient signature to bar a contract. (Order at 5).
- In *Advent Cleaners LLC*, No. 28-RD-147672 (Order dated Nov. 10, 2015), the regional director found tentative agreements signed on February 16 and 26 sufficient to bar a petition filed March 6, despite the draft agreement being sent back and forth with amendments on March 5 and 8.
- In *Sugar-House HSP Gaming LP*, No. 04-RD-082208 (Order dated June 25, 2012), the regional director found an informal e-mail exchange between the union and employer on May 30, before union contract ratification—signed not with electronic signatures, or even formal names, but with "Thank you, Rob" and "W"—was enough to bar an election for a petition filed June 1.

Even further limiting employee rights, a tie does not go to the "runner" when the proverbial "race to the court house" ends in a tie. Instead, the employee is out of luck and his election is barred. Even if a petition is filed *before* a contract is executed, but both occur on the same day, the contract bars the petition if the employer was not previously informed of the petition. *Deluxe Metal Furniture*, 121 NLRB at 999. In *Bendix Corp.*,

210 NLRB 1026 (1974), the Board held that a letter of agreement signed the same day as the decertification petition was filed constituted a sufficient informal document to bar an election.

The employee-petitioner in *Central Ohio Gaming Ventures, LLC*, No. 9-RD-126599 (May 14, 2014), faced a similar situation. There, the employee filed his petition on April 15 at 12:16 pm. Later that day, the employer e-mailed the union: "[w]e have a deal." The regional director held that this message, along with a prior union acceptance, constituted a contract for purposes of the contract bar and dismissed the petition as untimely. Thus, an informal exchange of e-mails, of which employees had no knowledge and which was sent *after* their petition was filed, prevented them from exercising their Section 9 rights for several years. *See also New Hampshire Public Defender*, No. 01-RD-002102 (Order dated Aug. 28, 2007) (petitioner informed union and employer of her intent to file a decertification petition on August 1, which she mailed on July 31. The parties then rushed to sign a contract on July 31; consequently, the petition was dismissed as untimely). Cruel jokes, unseemly "races to the courthouse," and pitfalls for the unwary await employees who try to navigate these shoals.

In short, employee rights under NLRA Sections 7 and 9 should not depend upon unknowable, arbitrary, and sometimes purposefully rigged rules like these. Incumbent unions should no longer be allowed to rely on arcane technicalities to thwart elections

and "game the system," especially when they are no longer wanted by a majority of those they purport to represent.[9] In *Appalachian Shale*, the Board noted it was:

> reexamining its contract bar rules with a view toward simplifying and clarifying their application wherever feasible in the interest of more expeditious disposition of representation cases and of achieving a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.

121 NLRB at 1160. But the vast amount of litigation over the minutiae of the contract bar rules and timelines shows that the Board has failed, in stunning fashion, to achieve this "balance." The Board should take this opportunity to return to simplicity and stability for employees—the real beneficiaries of the Act—and achieve the correct balance of the Act's policies through a rejection of the contract bar.

II. Alternatively, If the Board Maintains Any Contract Bar, It Should Be a One Year Bar with the Open Period at the Beginning of the Contract.

Alternatively, if the Board maintains any contract bar, that bar should be no longer than one year and begin to run no less than forty-five days after the employer and union (1) post a notice to employees informing them that a contract was executed and where at the workplace any employee can obtain a copy of that contract and (2) make the complete

[9] Even simple administrative errors can have draconian consequences for employees. In *Brunswick Bowling Products, LLC*, No. 07-RD-169464 (Mar. 4, 2016), *aff'd*, 364 NLRB No. 96 (Aug. 25, 2016), the Board dismissed a petition as untimely because it did not receive the showing of interest sent by the petitioner. Although the petitioner refiled his petition once he was informed of this fact, that second petition was filed after a contract was signed. The regional director took a hard line towards the petitioner: "Respondent's novel position that an otherwise valid contract bar can be overcome simply by a Petitioner's claimed error or ignorance to the processes and procedures of the NLRB appears to be completely without merit." However, the regional director and the Board took a softer approach with the union when it committed the technical error of failing to allege the contract bar as an affirmative defense. Rather than consider the argument waived, the Board dismissed the petition on that basis. *See* 364 NLRB No. 96, slip op. at 4–5 (Member Miscimarra, concurring in part & dissenting in part).

contract available at the designated workplace location, as well as publish it online absent extenuating circumstances. Under this approach, which is much like the Board's approach in voluntary recognition cases, employees would have at least a forty-five day open period at the *beginning* of a contract to determine if they want to continue with that union's representation, after having an opportunity to view the entire contract.

CONCLUSION

The contract bar contradicts the Act's text, was impermissibly concocted by the Board with little regard for employee rights, and was expanded over the decades to further infringe upon employee rights. Too many employees have seen their petitions dismissed based upon legal technicalities out of their control. The Board should grant review here and return to its original and proper understanding of the Act—that a contract bar is neither necessary nor permitted. Alternatively, the Board should at least stay this case pending its decision on the contract bar doctrine in *Mountaire Farms, Inc.*, Case No. 05-RD-256888.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Request for Review was e-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 6th day of January, 2021:

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